(6)

No. 88-42

In The

Supreme Court of the United States

October Term, 1988

OLAF A. HALLSTROM and
MARY E. HALLSTROM,

Petitioners,

v.

TILLAMOOK COUNTY,
a municipal corporation,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITIONERS' OPENING BRIEF

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QUESTION PRESENTED

The Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6987 (1982 ed. and Supp. III) ("RCRA") provides for citizen enforcement by "citizen suits." RCRA requires each citizen suit to be preceded by 60 days notice of the violation from the plaintiff to the Administrator of the Environmental Protection Agency, the State where the alleged violation occurred, and the alleged violator.

The Hallstroms gave the required 60 day notice to Tillamook County before filing this citizen suit, but they did not notify the Administrator or the State until after the suit was filed. Neither the Administrator nor the State were parties. The State had actual notice of the violation for a year and a half before the citizen suit was filed.

The question presented is whether the 60 day notice requirement is jurisdictional (requiring dismissal followed by refiling 60 days after formal notice) or procedural, and therefore subject to waiver, equitable modification, and cure.

LIST OF PARTIES AND CORPORATIONS

OLAF A. HALLSTROM and
MARY E. HALLSTROM,

Petitioners

TILLAMOOK COUNTY,
a municipal corporation
with no affiliation to any
parent or subsidiary or
related corporation,

Respondent

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 831 F.2d 889 (1987). The amended opinion of the court of appeals (J.A. 87-96) is reported at 844 F.2d 598 (1988). The opinion of the district court (J.A. 56-57) on the question presented is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-8a) was entered on November 3, 1987. A timely petition for rehearing was denied and an amended judgment (J.A. 87-96) was entered on April 7, 1988. The petition for a writ of certiorari was timely filed on July 6, 1988. The petition was granted on March 20, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

1. Section 7002 of the Resource Conservation and Recovery Act, 90 Stat. 2825, 42 U.S.C. § 6972 (1982 ed., Supp. III) provides:

§ 6972. Citizens suits

(a) In general

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf –

(1) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in

which the alleged violation occurred. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such regulation or order, or to order the Administrator to perform such act or duty as the case may be.

(b) Actions prohibited

No action may be commenced under paragraph (a)(1) of this section –

(1) prior to sixty days after the plaintiff has given notice of the violation (A) to the Administrator; (B) to the State in which the alleged violation occurs; and (C) to any alleged violator of such permit, standard, regulation, condition, requirement, or order; or

(2) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, or order; *Provided, however,* That in any such action in a court of the United States, any person may intervene as a matter of right.

(c) Notice

No action may be commenced under paragraph (a)(2) of this section prior to sixty days after the plaintiff has given notice to the Administrator that he will commence such action, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation. Any action respecting a violation under this chapter

may be brought under this section only in the judicial district in which such alleged violation occurs.

(d) Intervention

In any action under this section the Administrator, if not a party, may intervene as a matter of right.

(e) Costs

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(f) Other rights preserved

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency).

2. In 1984, Congress amended 42 U.S.C. § 6972 to authorize citizen suits to restrain solid waste practices "which may present an imminent and substantial endangerment to health or the environment." 98 Stat. 3268. The pertinent provisions in subsections (a) and (b) remained substantially the same except that Congress added "prohibition" after "requirement."

3. EPA Regulations on Prior Notice of Citizen Suits [under RCRA], 40 C.F.R. § 254 (1988) are set forth in Pet. App. D 20a-23a.

4. The following statutes contain identical or substantially similar 60-day notice provisions for citizen suits:

a. Section 505(a) and (b) of the Federal Water Pollution Control Act, 86 Stat. 888, 33 U.S.C. § 1365(a) and (b) (1982 ed.).

b. Section 304(a) and (b) of the Clean Air Act, 84 Stat. 1706, 42 U.S.C. § 7604(a) and (b) (1982 ed.).

c. Section 105(g)(1) and (2) of the Marine Protection, Research, and Sanctuaries Act of 1972, 86 Stat. 1057, 33 U.S.C. § 1415(g)(1) and (2) (1985 ed.).

d. Section 12(a) and (b) of the Noise Control Act of 1972, 86 Stat. 1243, 42 U.S.C. § 4911(a) and (b) (1982 ed.).

e. Section 16(a) and (b) of the Deepwater Port Act of 1974, 88 Stat. 2140, 33 U.S.C. § 1515(a) and (b) (1982 ed.).

f. Section 1449(a) and (b) of the Safe Drinking Water Act, 88 Stat. 1690, 42 U.S.C. § 300j-8(a) and (b) (1982 ed.).

g. Section 520(a) and (b) of the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 503, 30 U.S.C. § 1270(a) and (b) (1982 ed.).

h. Section 20(a) and (b) of the Toxic Substance Control Act, 90 Stat. 2041, 15 U.S.C. § 2619(a) and (b) (1982 ed.).

i. Section 310(a) through (d) of the Comprehensive Environmental Response, Compensation, and Liability Act, 100 Stat. 1703, 42 U.S.C. § 9659(a) through (d)(Supp. IV 1986).

j. Section 11(g)(1) and (2) of the Endangered Species Act of 1973, 87 Stat. 897, 16 U.S.C. § 1540(g)(1) and (2) (1982 ed.).

k. Section 23(a)(1) and (2) of the Outer Continental Shelf Lands Act, 92 Stat. 657, 43 U.S.C. § 1349(a)(1) and (2) (1982 ed.).

l. Section 11(a) and (b) of the Act to Prevent Pollution from Ships, 94 Stat. 2302, 33 U.S.C. § 1910(a) and (b) (1982 ed.).

m. Section 24(a) of the Consumer Product Safety Act, 86 Stat. 1226, 15 U.S.C. § 2073(a) (1982 ed.).

STATEMENT OF THE CASE

The Hallstroms invoked the jurisdiction of the district court under § 7002 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972 ("RCRA"), and under 28 U.S.C. § 1331 (federal question). J.A. 3-4 (complaint), 59, 70-72 (pretrial order).

The Hallstroms own and reside on a dairy farm located next to the Tillamook County Landfill. J.A. 60. The Hallstroms filed this action to compel Tillamook County to operate its landfill in compliance with the standards and requirements established under RCRA. J.A. 3-10. The Hallstroms also sought damages for state claims of inverse condemnation, trespass, and nuisance. *Id.*

On April 20, 1981, the Hallstroms mailed formal notice of the violation and of their intention to sue Tillamook County to compel compliance with RCRA. J.A. 61. The Hallstroms did not send a copy of this formal notice to the Administrator of the Environmental Protection Agency or Oregon's Department of Environmental Quality ("DEQ"). J.A. 27.

On April 9, 1982, the Hallstroms filed the complaint in this case. They did not name the Administrator or DEQ as parties defendant. J.A. 3-10; 61.

For at least a year and a half before the Hallstroms filed this citizen suit, DEQ had actual knowledge of the violations and sent several enforcement letters to Tillamook County. Plaintiffs' Exhibit 7 is a chronology that DEQ prepared. Some of the events listed are:

10/14/80 -	"Informative" enforcement letter sent to county. Monitoring wells damaged, drainage problems, excessive litter.
12/23/80 -	Stronger enforcement letter sent to county. Leachate overflowing berm. Leachate system problems. Too much exposed waste. Inadequate cover.
1/26/81 -	Very strong enforcement letter sent to county. Monitoring wells damaged, leachate system problems, drainage problems, erosion problems, too much exposed waste.
4/23/81 -	Permit issued for "new" landfill (current permit).
7/12/82 -	Notice of Violation issued to county. Monitoring wells damaged, leachate system problems, too much exposed refuse, excessive litter.
1/03/83 -	Notice of Violation issued to county. Excessive litter.
3/21/83 -	"Informative" enforcement letter sent to county. Additional monitoring wells needed. Better wet months cover material needed. Leachate system improvements needed.

By June 29, 1982, and certainly no later than December 1982, DEQ had actual knowledge of the Hallstroms' citizen suit. J.A. 35-37.

By January 17, 1983, EPA had actual knowledge of the Hallstroms' citizen suit. J.A. 23-25.

On March 1, 1983, Tillamook County filed a motion for summary judgment asking the district court to dismiss the case because 60 days advance notice had not been given to the EPA or DEQ. J.A. 15-25.

The next day, on March 2, 1983, the Hallstroms sent a copy of their original notice of the violation to the EPA and DEQ. J.A. 40-43. At the same time, the Hallstroms notified the EPA and DEQ of their intention to refile the citizen suit if the trial court dismissed the case. *Id.*

On April 22, 1983, nine (9) days before the 60 day notice period would have expired, the district court held that dismissal for failure to give notice to the EPA and DEQ "would be a waste of judicial resources." J.A. 56-57. The district court said in its opinion:

> Neither the EPA nor the DEQ is a party in this action. In addition, plaintiffs have cured any defect by formally notifying the EPA and DEQ on March 2, 1983. The agencies have sixty (60) days from that date to take appropriate steps to cure any violations it finds at the Tillamook County Landfill. Over thirty (30) days have passed with no action from either State or Federal officials.

Id.

In the pretrial order lodged with the district court, the Hallstroms again alleged subject matter jurisdiction under 42 U.S.C. § 6972 and notice. J.A 58-59, 70, 72.

Trial began over two years later on July 23, 1985, and was completed on July 26, 1985. J.A. 75. The district court found that Tillamook County had violated and would continue to violate RCRA, and it ordered Tillamook County to propose a plan that would completely and permanently contain leachate generated by the landfill within the landfill boundaries. J.A. 83-86. The state claims were tried to a jury, which found for Tillamook County on the three state claims. J.A. 75.

After the final judgment was entered, the Hallstroms moved for an award of $42,000 in attorney fees and $53,000 in expert witness fees that they paid in connection with their citizen suit. Excerpt at 181-190. The district court denied the Hallstroms' motion even though it found that Tillamook County had violated RCRA and would continue to do so unless restrained. J.A. 74-86; Excerpt at 228-236.

The Hallstroms appealed this decision and other rulings to the Ninth Circuit. The Ninth Circuit, however, limited its review to the question now before this Court.

The majority interpreted the statute to say that 60 days notice is a precondition to the district court's subject matter jurisdiction, and remanded the case for dismissal. J.A. 88. The dissent interpreted the statute to require that 60 days elapse before the district court may act. The dissent reasoned that a stay would further the goal of agency enforcement while avoiding the excessively formalistic requirement of dismissal followed by refiling. J.A. 96.

SUMMARY OF ARGUMENT

The text, structure, and legislative history of RCRA's citizen suit provisions indicate that the 60 day notice requirement is not jurisdictional. It is instead a procedural requirement that should be applied in light of its purpose, and is subject to waiver, estoppel, and equitable modification or cure.

Subsection (a) creates the right of citizens to enforce RCRA by civil action in court and expressly grants to the district courts subject matter jurisdiction over citizen enforcement actions. The remaining subsections govern other matters such as notice, the effect of pending government actions, litigation costs, intervention, and the preservation of other rights. Subsection (a) does not limit this district court's jurisdiction to cases commenced after 60 days notice.

An interpretation that the notice requirement is not jurisdictional furthers the general purpose of RCRA and its citizen suit provision, to protect the environment from open dumping and to encourage citizen enforcement as a supplement to government enforcement, without undermining the particular purpose of the notice requirement, to trigger government action.

A nonjurisdictional interpretation is consistent with the general principles of statutory construction to interpret to accomplish the purpose of the legislation and to avoid unreasonable or futile results plainly inconsistent with the general purpose of the legislation as a whole.

A nonjurisdictional interpretation is consistent with this Court's decisions in *Gwaltney*, *Middlesex*, and *Zipes v. Trans World Airlines*. In *Zipes*, this Court unanimously held that timely filing of a charge with the EEOC was not a jurisdictional requirement to a Title VII suit in federal court, but was instead subject to waiver, estoppel, and equitable modification. The same analysis used in *Zipes* applies with equal force here.

The notice requirement was waived by the government – neither EPA nor DEQ commenced an enforcement action after receiving actual or formal notice of the violation. The failure to give notice was cured by formal notice of the violation and of intent to sue after the case was filed but over two years before trial (and before Tillamook County was ordered to comply with RCRA). The Hallstroms justifiably relied on the district court's decision that dismissal and refiling was not required.

ARGUMENT

1. The Text And Structure Of The Statute Do Not Limit Jurisdiction To Cases In Which 60 Days Notice Was Given.

The two subsections of the citizen suit section of RCRA, § 7002(a) and (b), 42 U.S.C. § 6972(a) and (b) provide in pertinent part:

> Citizen suits.
>
> (a) In general
>
> Except as provided in subsection (b) . . . of this section, any person may commence a civil action on his own behalf –
>
> (1) against any person . . . who is alleged to be in violation of any permit, standard, regulation,

condition, requirement, or order which has become effective pursuant to this chapter;

. . .

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred. . . . The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such regulation or order, ...

(b) Actions prohibited

No action may be commenced under paragraph (a)(1) of this section –

(1) prior to sixty days after the plaintiff has given notice of the violation (A) to the Administrator; (B) to the State in which the alleged violation occurs; and (C) to any alleged violator of such permit, standard, regulation, condition, requirement, or order; or

(2) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, or order: *Provided, however,* That in any such action in a court of the United States, any person may intervene as a matter of right.

a. Subsection (a).

Subsection (a) creates the right of citizens to enforce RCRA and expressly grants to the district courts subject matter jurisdiction over such enforcement actions. The remaining subsections of § 7002 govern other matters such as notice, the effect of pending government enforcement actions, costs and attorney fees, intervention by

citizens and the government, and the preservation of other rights.

To invoke the district court's jurisdiction, the citizen must allege in good faith a continuing violation of RCRA. *Gwaltney of Smithfield v. Chesapeake Bay Found.*, ___ U.S. ___, 108 S.Ct. 376, 385-86 (1987).

Subsection (a) does not limit jurisdiction to those cases where 60 days notice was given or where there is no pending government enforcement action. The provision requiring 60 days notice is entirely separate and does not speak in jurisdictional terms or refer to the jurisdiction of the court.

b. Subsection (b)(1).

Subsection (b)(1) requires the citizen to give 60 days notice of the violation to the alleged violator and the government.

Notice to the violator gives him a chance to bring himself into complete compliance in 60 days. If the violator comes into complete compliance in 60 days and it is absolutely clear that the violation cannot reasonably be expected to recur, then the citizen suit is unnecessary. If the citizen cannot in good faith allege a continuing violation, the district court does not have subject matter jurisdiction under subsection (a). *Gwaltney of Smithfield v. Chesapeake Bay Found.*, ___ U.S. ___, 108 S.Ct. 376, 385-86 (1987).

Notice of the violation to the government should trigger government action. The Senate Committee Report on the Clean Air Amendments said:

> In order to further encourage and provide for agency enforcement, the Committee has added a requirement that prior to filing a petition with the court, a citizen or group of citizens would first have to serve notice of intent to file such action on the Federal and State air pollution control agency and the alleged polluter.

116 Cong. Rec. 32,926 (1970).

If government action is successful in compelling the violator into complete compliance in 60 days, then the citizen suit is unnecessary and the district court lacks subject matter jurisdiction, again under subsection (a), because the citizen could no longer allege in good faith a continuing violation. *Gwaltney of Smithfield v. Chesapeake Bay Found.*, ___ U.S. ___, 108 S.Ct. 376, 385-86 (1987).

c. Subsection (b)(2).

Subsection (b)(2) provides that if the government has commenced, and is diligently prosecuting, an action in court to compel compliance, a citizen suit is prohibited. Thus, if the government decides to act after receiving notice, but is unsuccessful in compelling the violator to comply with RCRA, the government then has a choice of (1) doing nothing further, (2) continuing efforts to compel compliance by action out of court, or (3) filing an enforcement action in court. Only one of these three alternatives can prevent a citizen suit from proceeding, *i.e.* filing and diligently prosecuting an enforcement action in court. *See Gwaltney of Smithfield v. Chesapeake Bay Found.*, ___ U.S. ___, 108 S.Ct. 376, 379, 383 (1987).

If the government commences an enforcement action within the 60 day period and diligently prosecutes it, the citizen suit is barred. This bar, however, is not a jurisdictional bar. The legislative history to the Clean Air Amendments of 1970 indicates that the district courts have jurisdiction over citizen suits even when the government has commenced and is diligently prosecuting an action in court. The Senate Committee Report states:

> It should be emphasized that if the agency had not initiated abatement proceedings following notice or if the citizen believed efforts initiated by the agency to be inadequate, the citizen might choose to file the action. In such case, the courts would be expected to consider the petition against the background of the agency action and could determine that such action would be adequate to justify suspension, dismissal, or consolidation of the citizen petition. On the other hand, if the court viewed the agency action as inadequate, it would have jurisdiction to consider the citizen action notwithstanding any pending agency action.

116 Cong. Rec. 32,926 (1970).

Thus, if the district court determined that the government had commenced and was diligently prosecuting an action in court to require compliance, the district court would still have authority to do one of three things: dismiss, stay, or consolidate the citizen suit. If the district court has authority to do any of those things, then it has subject matter jurisdiction.

2. A Procedural Interpretation Serves The Particular Purpose Of The Notice Provision Without Doing Violence To The Overriding Purposes Of RCRA Of Protecting The Environment And Encouraging Citizen Enforcement.

a. The Purpose Of RCRA.

The purpose of RCRA is to protect the environment from the hazards of open dumps such as the Tillamook County Landfill. The House Committee Report said:

> The existing methods of land disposal often result in air pollution, subsurface leachate and surface run-off, which affect air and water quality. This legislation will eliminate this problem and permit the environmental laws to function in a coordinated and effective way.

H.R. Rep. No. 94-1491 - Part I, 94th Cong., at 4, *reprinted in* [1976] U.S. Code Cong. & Ad. News 6241-42.

b. The Purpose Of RCRA's Citizen Suit Provision.

The purpose of the citizen suit provision of RCRA, as well as similar provisions in the other federal statutes, is to authorize citizens to act as private attorneys general to protect the environment as a supplement to government enforcement.

The Senate Committee, in its report on the proposed citizen suit provisions of the Clean Air Amendments of 1970, 42 U.S.C. § 7604(a) and (b), said:

> The Courts should recognize that in bringing legitimate actions under this section citizens would be performing a public service and in such instances the courts should award costs of litigation to such party. This should extend to plaintiffs in actions

> which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is reached, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions.

116 Cong. Rec. 32,927 (1970).

As Senator Hart observed while speaking in support of the citizen suit provision of the Clean Air Amendments, citizen suits were designed to protect the environment when government resources are inadequate:

> The basic argument for the [citizen suit] provision is plain: namely that Government simply is not equipped to take court action against the numerous violations of legislation of this type which are likely to occur. In testifying on a similar bill before the Senate Subcommittee on Energy, Natural Resources and the Environment, former Attorney General Ramsey Clark spoke convincingly of this inevitable incapability. Mr. Clark stated:
>
> It will be impossible for government enforcement to control all significant acts of pollution. . . .The extension of private right, . . . and effective sanctions for the persons directly affected or concerned will be essential if vital interests are to be protected. Our experience in areas of massive unlawful racial discrimination, such as in schooling, employment, and housing tells us that however hard it might try, government will never have the manpower, the techniques, or the awareness necessary to enforce the law for all. Private enforcement of those laws is the only way the individual can be assured that the rights cannot be violated with impunity.
>
> Pollution control is another such area. If we are really serious about controlling the quality of our environment before it destroys the quality of our

> lives, we must give the individuals affected by, or concerned about pollution in his life, the power to stop them through legal process.
>
> Far from risking an undue or inhibiting interference with Government enforcement, it will provide powerful supplementary enforcement . . . and an effective and desirable prod to officials to do their duty.

116 Cong. Rec. 33,104 (1970).

In answer to a concern that citizen suits might burden the courts with a flood of litigation, Senator Hart observed that it would be the rare citizen who would undertake the financial burden of acting as a private attorney general:

> First of all, it should be noted that the bill makes no provision for damages to the individual. It therefore provides no incentives to suit other than to protect the health and welfare of those suing and others similarly situated. It will be the rare, rather than the ordinary, person, I suspect, who, with no hope of financial gain and the very real prospect of financial loss, will initiate court action under this bill. For the most part, only in the case where there is a crying need for action will action in fact be likely.

Id.

Because citizen suits were designed to supplement government enforcement efforts hampered by inadequate resources, they should be encouraged and welcomed. In *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976), the Second Circuit said:

> In enacting § 304 of the 1970 Amendments [to the Clean Air Act], Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the

> vindication of environmental interests. Fearing that administrative enforcement might falter or stall, "the citizen suits provision reflected a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the Act would be implemented and enforced." [Citation omitted.]

c. The Purpose Of The Notice Provision.

When subsections (b)(1) and (b)(2) are read together and considered in light of their legislative history, it is apparent that the purpose of the notice requirement is to prod the government to act and act quickly, *i.e.* within 60 days, by (1) pressuring the violator to come into complete compliance or (2) commencing an enforcement action in court.

The purpose of triggering government action is served when notice of the violation is received by the government, regardless of whether it is received before or after commencement of the citizen suit, as long as the district court takes no action on the suit such as issuing an injunction or temporary restraining order. The Senate Report on the citizen suit provision of the Federal Water Pollution Control Act, 33 U.S.C. § 1365, provides:

> No action on a suit may begin for 60 days following notification. If EPA or the State begins a civil or criminal action on its own against the alleged violator, no court action may take place on the citizen's suit.

S.Rep. 92-414, 92d Cong., *reprinted in* [1972] U.S. Code Cong. & Ad. News 3745.

If the citizen fails to give notice of the violation to the government before commencing suit, a stay until 60 days

after notice will serve the particular purpose of triggering government action. If the government succeeds in compelling the violator into complete compliance in 60 days, then the case would be dismissed for lack of subject matter jurisdiction under subsection (a) and *Gwaltney* because the citizen could no longer allege in good faith a continuing violation. If the government files an enforcement action in court, then the district court has jurisdiction to dismiss, stay, or consolidate the citizen suit. If the government does nothing and the violator does not bring itself into complete compliance, then the citizen suit could proceed with no prejudice to the violator and with no violence to the general purpose of RCRA (to protect the environment from open dumping) or to the particular purpose of the notice requirement (to trigger government action).

Thus, the text, structure, legislative history, and purpose of the citizen suit provision indicate that notice is a procedural, not a jurisdictional, requirement that should be applied in light of its particular purpose of encouraging government enforcement while not defeating the overriding purpose of RCRA to protect the environment.

3. The Principles Of Statutory Construction Indicate That The Notice Requirement Is Not Jurisdictional.

a. The Language Is The Starting Point.

As is frequently said, "the starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The reason why the language of the

statute itself is the starting point, and not the end point, is because the purpose of the statute may be defeated by a literal reading. In *Lynch v. Overholser*, 369 U.S. 705 (1962), Justice Harlan said:

> The decisions of this Court have repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute, for "literalness may strangle meaning."

369 U.S. at 710.

Justice Stevens said much the same thing in his dissent in *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982):

> In final analysis, any question of statutory construction requires the judge to decide how the legislature intended its enactment to apply to the case at hand. The language of the statute is usually sufficient to answer that question, but "the reports are full of cases" in which the will of the legislature is not reflected in a literal reading of the words it has chosen.

458 U.S. at 578 (quotation in footnote from *Holy Trinity Church v. United States*, 143 U.S. 457 (1892), omitted).

Here, subsection (b) provides that no citizen suit may be commenced until 60 days after notice of the violation. The statute does not provide that notice is a jurisdictional requirement. The provision granting jurisdiction to the district courts and the provision requiring notice are in separate subsections. The notice section does not speak in jurisdictional terms or refer in any way to the district court's jurisdiction.

A similar question was presented in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982). In that case, the question presented was whether the timely filing of a charge with the Equal Employment Opportunity Commission was a jurisdictional requirement for bringing a Title VII action in federal court. Justice White, writing for a unanimous Court, held that the filing requirement was not jurisdictional, in part because the provision granting jurisdiction does not, by its terms, limit jurisdiction to cases preceded by a timely filing with the EEOC. 455 U.S. at 394-95.

b. Interpret According To Purpose.

When the words of the statute do not resolve the question, the statute should be interpreted to give effect to its purpose. In *United States v. Shirey*, 359 U.S. 255 (1959), Justice Frankfurter said:

> Statutes, including penal enactments, are not inert exercises in literary composition. They are instruments of government, and in construing them "the general purpose is a more important aid to meaning than any rule which grammar or formal logic may lay down." This is so because the purpose of an enactment is imbedded in its words even though it is not always pedantically expressed in words. Statutory meaning, it is to be remembered, is more to be felt than demonstrated, or, as Judge Learned Hand has put it, the art of interpretation is "the art of proliferating a purpose."

359 U.S. at 260-61 (citations omitted).

As noted above, the primary purpose of RCRA is to protect the environment from open dumping. The particular purpose of the citizen suit provision is to provide for

citizen enforcement to supplement government enforcement. The particular purpose for notice to the government is to trigger government action that might render a citizen suit unnecessary. However, there are only two kinds of government action that can prevent a citizen suit: (1) action that compels a violator into complete compliance within 60 days, and (2) a civil or criminal action filed in court by the government within 60 days to compel compliance. Of those two, only complete compliance by the violator with no reasonable expectation of recurrence of the wrongful behavior can affect the district court's subject matter jurisdiction. *Gwaltney of Smithfield v. Chesapeake Bay Found.*, ___ U.S. ___, 108 S.Ct. 376, 386 (1987); *see* discussion of subsection (b)(2) in Part 1.c., pp. 14-15 above.

An interpretation that notice is not a jurisdictional requirement serves the particular purpose of the notice requirement without defeating the general purposes of RCRA and its citizen suit provision of (1) protecting the environment from open dumping, and (2) encouraging citizen enforcement when the government lacks the human and financial resources for its own enforcement action.

It should be mentioned that in *Zipes*, the Court considered legislative history, case law, and the purpose to be served by the filing requirement in addition to the words of the statute. Legislative history and case law were not dispositive, so the Court considered both the remedial purpose of Title VII and the particular purpose of the filing requirement.

The Third, Eighth, and District of Columbia Circuits have interpreted the notice requirement to be procedural, not jurisdictional. *Susquehanna Valley Alliance v. Three Mile Island*, 619 F.2d 231, 243 (3rd Cir. 1980), *cert. denied* 449 U.S. 1096 (1981); *Hempstead Cty. and Nevada Cty. Project v. U.S.E.P.A.*, 700 F.2d 459, 463 (8th Cir. 1983); *Natural Resources Defense Council v. Train*, 510 F.2d 692, 702 (D.C. Cir. 1975)(court has jurisidiction but should exercise discretion to stay suit when requested by EPA).

In *Susquehanna*, the Third Circuit concluded that interpreting the notice requirement "to require dismissal and refiling would be excessively formalistic." 619 F.2d at 243. In *Hempstead*, the Eighth Circuit said that notice is a requirement that had not been formally met, "but [we] note that the purpose of such notice has long been satisfied in the instant action." 700 F.2d at 463.

In contrast, circuit court cases that interpret the notice requirement as jurisdictional ignore the general purpose of federal environmental law, elevate form over substance, and are based on an erroneous analysis of the purpose of the notice requirement.

In *Garcia v. Cecos Intern., Inc.*, 761 F.2d 76 (1st Cir. 1985), the court began its analysis with the legislative history that indicated that the purpose of the notice provision was "to trigger the [EPA's] enforcement mechanism." 761 F.2d at 81. From that, the court inferred that Congress must have intended the notice provision to be an absolute requirement because Congress must have believed that after a citizen suit is filed (rather than merely threatened in a formal written notice) positions will become hardened, lawyers employed, legal fees paid,

and the government will somehow have "less room for maneuver and compromise." 761 F.2d at 82. The court concluded that settlement is much more likely when suit is threatened rather than filed:

> Permitting immediate suit ignores the possibility that a violator or agency may change its mind as the threat of suit becomes more imminent. After the complaint is filed the parties assume an adversary relationship that makes cooperation less likely. Because a mere adjustment of the trial date or the filing of a supplemental or amended complaint to cure defective notice cannot restore a sixty-day non-adversarial period to the parties, we would therefore dismiss suits where the complaint is filed less than sixty days after actual notice to the agency and the alleged violators.

761 F.2d at 82.

There are several problems with this analysis.

First, it is well known that the threat of a lawsuit is not nearly as strong an inducement to settlement as an actual lawsuit. Indeed, there is nothing like an imminent trial date to get people into the spirit of compromise.

Second, there is nothing in the text of the statute or in its legislative history that supports the idea that the purpose of the 60 day period was to keep the citizen-plaintiff and the violator from being adversaries. Once the citizen suit procedures are initiated, whether by giving formal notice to the violator or by commencing an action, the citizen and the violator are adversaries.

Third, the court does not explain how a dismissal of a pending lawsuit can "restore a sixty-day non-adversarial period to the parties." The reality is that people become

adversaries long before they resort to court procedures. People do not magically become non-adversaries when their case is dismissed, particularly when the case is dismissed because of a technical procedural requirement. Quite the contrary.

Fourth, the court does not explain how a non-judicial resolution would become more likely if the citizen suit were dismissed rather than merely stayed for the 60 day period. The court did quote the dissenting opinion of Judge Merritt in *Ada-Cascade Watch Co. v. Cascade Resource Recovery*, 720 F.2d 897 (6th Cir. 1983) as arguing that a stay for 60 days "would provide little incentive for plaintiffs to seek alternative methods of resolving their disputes" because "positions may have hardened, lawyers employed and legal fees paid." However, that analysis ignores the reality that lawyers will have to be employed and legal fees will have to paid for the formal written notice as well as the initial complaint.

The Ninth Circuit relied heavily on *Garcia* in *Hallstrom v. Tillamook County*, 844 F.2d 598 (9th Cir. 1988), J.A. 87-96:

> We also agree with the First Circuit that the jurisdictional interpretation of § 6972(b) serves better the underlying policy aims of encouraging non-judicial resolution of environmental conflicts. As it noted, once a suit is filed, positions become hardened, parties incur legal fees, and relations become adversarial so that cooperation and compromise is less likely.

844 F.2d at 601, J.A. at 92 (citation to *Garcia* omitted).

Again, the Ninth Circuit does not explain how dismissal and refiling can work better than a stay to encourage non-judicial resolution of the conflict or the triggering of government action.

In *Walls v. Waste Resource Corp.*, 761 F.2d 311 (6th Cir. 1985), the court concluded that notice is a jurisdictional requirement because:

> Congress evidently believed that the filing of a private lawsuit hardens bargaining positions and leaves the Administrator with less room to maneuver, and that the private lawsuit should be a supplemental enforcement tool, rather than a substitute for agency enforcement.

761 F.2d at 317.

There are several problems with this analysis as well.

First, there is nothing in the statute or its legislative history to support the inference that Congress believed that the filing of a lawsuit hardens bargaining positions.

Second, there is nothing in the statute or its legislative history to support the inference that a citizen suit would leave the government with "less room to maneuver." There is nothing about the filing of a citizen suit that will somehow curtail the government's authority, and there is certainly nothing magical about dismissal of a citizen suit that will enhance the government's authority. If anything, dismissal of a citizen suit would most likely encourage the violator to continue to violate the law rather than obey it.

Third, the court does not explain how a stay for 60 days would be any less effective than dismissal in honoring Congress's intention that citizen suits be a supplement to, rather than a substitute for, government enforcement.

Garcia, Hallstrom, and *Walls* have the same basic flaws. They misconstrue the purpose of the notice provision, they ignore the general remedial purposes of federal environmental law to protect the environment and encourage citizen enforcement, and they do not adequately explain how dismissal and refiling serves the purpose of the statute better than a stay.

c. Interpret to Avoid Futile, Absurd, Or Unreasonable Results That Defeat Purpose.

If the bare words of the statute would produce an absurd or futile result, or one contrary to the underlying purpose of the statute, the court should interpret the statute to carry into effect the end Congress wanted to accomplish. In *White v. Texas*, 310 U.S. 534 (1940), Justice Reed observed:

> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words.

310 U.S. at 543 (citations omitted).

In this case, the Hallstroms successfully brought an action against Tillamook County to compel compliance with RCRA. DEQ had actual knowledge of the violation for a year and a half before the citizen suit was commenced. Although the EPA and DEQ were not formally notified of the violation before the citizen suit was filed, they had actual knowledge, as well as formal notice, of the violation and the citizen suit more than two years before trial began. The EPA and DEQ did not object to not having received notice, and they did not file enforcement actions of their own. The case proceeded to trial, and the environment was at least partly protected. The district court ordered Tillamook County to contain all surface water pollution within the landfill boundaries. It was the purpose of RCRA and its citizen suit provisions to allow citizens like the Hallstroms to bring this kind of enforcement action and obtain this kind of result.

The Ninth Circuit's jurisdictional interpretation would undo all that for no reason. After all, DEQ knew about the violation, and only DEQ, not the EPA, has authority under RCRA to initiate an administrative proceeding to enforce compliance with the solid waste subchapter, §§ 4001-4009, 42 U.S.C. §§ 6941-6949. Furthermore, neither the EPA nor DEQ filed an enforcement action in court or voiced any objection to having received notice after the Hallstroms' citizen suit was filed.

In *Hallstrom,* the Ninth Circuit also based its decision on its conclusion that a procedural interpretation would

render the notice provision worthless. 844 F.2d at 601, J.A. at 92-93. This is not true.

First, the purpose of triggering government action is served whether the citizen suit is stayed or required to be dismissed and refiled. Second, an interpretation that the notice requirement may be waived or modified when required by equity does not make the notice requirement worthless. Here, DEQ, the agency with administrative enforcement authority, had notice of the violation a year and a half before the citizen suit was commenced. Third, citizen-plaintiffs would ordinarily comply with a procedural notice requirement in the hope of triggering government enforcement action while still having a right to intervene under subsection (b) (2). Fourth, citizen-plaintiffs would ordinarily comply with a procedural notice requirement to avoid the expense and delay of responding to a defense based on failure to give notice. Fifth, citizen-plaintiffs would ordinarily comply with a procedural notice requirement to avoid the loss of court costs and attorney fees if the violator brought himself into complete compliance during the 60 day period while the case was stayed.

Thus, a procedural interpretation would lead to results consistent with the remedial purpose of the statute and with the particular purpose of the notice requirement. A jurisdictional interpretation, on the other hand, would often lead to absurd or unreasonable results plainly at variance with the general purpose of RCRA and other federal environmental statutes in other instances.

For example, suppose that before bringing a citizen suit, the citizen contacts the EPA, DEQ, and the violator. The EPA and DEQ both tell the citizen that they lack the resources even to investigate, much less do anything, about the problem. The violator does not have much use for meddling citizens or environmental laws and says, "Go ahead and sue." A jurisdictional interpretation would require 60 days to elapse after formal notice even though the notice and the waiting period would be entirely futile. A procedural interpretation, on the other hand, would make the notice and 60-day waiting period subject to waiver.

For another example, suppose a citizen suit is brought under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a)(1) and (2), after giving the required formal notices to the government and the violator. Suppose further that additional facts come to light during discovery that support a claim under the Act to Prevent Pollution From Ships, 33 U.S.C. § 1911(a) and (b). If the citizens gave the required notices under the Ships Act and then waited 60 days before amending their original complaint to state a claim under the Ships Act, a jurisdictional interpretation would result in the district court's not having subject matter jurisdiction over the Ships Act claim because the action was not commenced 60 days after notice. *See* Fed.R.Civ.P. 15(c) (Relation Back of Amendments). Instead, the citizen would have to file a new action based on the Ships Act violation, and then move to consolidate the two cases. There may also be a issues concerning whether discovery in the first case could be used in the second case and whether a bifurcated trial was required.

As a final example, suppose three companies are acting together in flagrant violation of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*, that the citizen gave 60 days formal notice to the government but only two of the three violators, and that the three companies refused to comply. A jurisdictional interpretation, the interpretation that Tillamook County wants this Court to adopt, would result in dismissal of the citizen suit against all three violators.

4. A Procedural Interpretation Is Consistent With Case Law.

a. A Procedural Interpretation Is Consistent With *Gwaltney*.

In *Gwaltney of Smithfield v. Chesapeake Bay Found.*, ___ U.S. ___, 108 S.Ct. 376 (1987), this Court wrote that the purpose of the 60-day notice requirement in an identical citizen suit provision in the Federal Water Pollution Control Act, 33 U.S.C. § 1365(a)(1), is to give the violator an opportunity to bring itself into complete compliance and to give the government time to file a civil enforcement action in court. 108 S.Ct. at 382-83. This Court's interpretation of the purpose of the notice provision is consistent with *Chesapeake Bay Found. v. American Recovery Co.*, 769 F.2d 207, 208-09 (4th Cir. 1985) (60-day waiting period gives government opportunity to control course of litigation if it acts within 60 days).

This Court did not in any way suggest that the purpose of the waiting period was to maintain a non-adversarial period to encourage non-judicial resolution or to relieve any perceived burden that citizen suits place on

federal courts or the government. The only kind of government action that can stop a citizen suit is a civil enforcement proceeding filed in court. Thus, the Ninth Circuit's concern that a pragmatic interpretation of the notice requirement would not encourage non-judicial resolution misses the point. The statutory framework for RCRA and the other similar environmental statutes assumes that the only kind of non-judicial resolution of the conflict is if the violator brings itself into complete compliance within 60 days. Otherwise, the violator will face court action either by the government or by citizens acting as private attorneys general.

b. A Procedural Interpretation Is Consistent With *Middlesex*.

In *Middlesex Cty. Sewerage Auth. v. Sea Clammers*, 453 U.S. 1 (1981), this Court did not decide whether notice was a jurisdictional or procedural requirement for environmental citizen suits, nor did this Court discuss the purpose of the notice requirement. Instead, this Court limited its review to whether Congress intended to imply a private right of action independent of the citizen suit provisions of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* and the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1401 *et seq.* The Court observed that FWPCA and MPRSA had "unusually elaborate enforcement provisions" that required compliance "with *specified procedures* – which respondents here ignored – including in most cases 60 days' prior notice to the potential defendants." 453 U.S. at 14 (emphasis added).

Although this Court did not decide whether the notice provision was jurisdictional or procedural, the language this Court chose, *i.e.*, "specified procedures," suggests that notice is a procedural, rather than a jurisdictional, requirement.

c. A Procedural Interpretation Is Consistent With *Zipes v. Trans World Airlines* And Its Progeny.

In *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), this Court held that a similar prefiling requirement was not a jurisdictional prerequisite. In that case, the question presented was whether the statutory time limit for filing charges with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1954, 78 Stat. 253, 42 U.S.C. § 2000e *et seq.* was a jurisdictional prerequisite to a suit in district court. The court considered the statutory language, the legislative history, case law, the purpose of the filing requirement, and the remedial purpose of the legislation as a whole, and concluded that the filing requirement was not a jurisdictional prerequisite. Instead, this Court held that it was a requirement that was subject to waiver, estoppel, and equitable tolling:

> By holding compliance with the filing period to be not a jurisdictional prerequisite to filing a Title VII suit, but a requirement subject to waiver as well as tolling when equity so requires, we honor the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer.

455 U.S. at 399.

5. The Notice Requirement Is Subject To Waiver, Estoppel, And Equitable Modification.

In *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984), another Title VII case, this Court said that equitable tolling of the 90-day filing requirement after receipt of the right-to-sue letter might be appropriate "where the court has led the plaintiff to believe that she had done everything required of her." 466 U.S. at 152.

Here, the Hallstroms justifiably relied on the district court's decision that they need not dismiss and refile because they had "cured any defect by formally notifying the EPA and DEQ on March 2, 1983." J.A. at 57.

In *Pinkard v. Pullman-Standard, a Div. of Pullman, Inc.*, 678 F.2d 1211 (5th Cir. 1982), the Fifth Circuit held that receipt of a right-to-sue letter before filing a Title VII suit was a condition precedent subject to equitable modification. Specifically, the court held that receipt of a right-to-sue letter while an action was still pending "furthers the remedial purposes of the act without undermining the particular purpose of that requirement, to give the EEOC an opportunity to fulfill its function of investigating the charge in attempting conciliation." 678 F.2d at 1218.

In reaching that conclusion, the Fifth Circuit observed that allowing subsequent receipt of the right-to-sue letter to cure would probably not "encourage plaintiffs to attempt to bypass the administrative process because premature suits are subject to a motion to dismiss at any time before notice of the right to sue is received." *Id.* The court further observed:

> To distinguish such an action, once dismissed and then renewed, from an action where the defect is cured while the action remains pending is to distinguish between a glass half-full and a glass half-empty.

Id.

The court also based its decision on the "general policy of the law to find a way to prevent the loss of valuable rights, not because something was done too late, but rather because it was done too soon." *Id.*

The same reasons that supported *Pinkard*'s interpretation also support a procedural interpretation of the notice requirement at issue in this case. *See also Burnett v. New York Central Railroad Company*, 380 U.S. 424 (1965) (FELA statute of limitations tolled to effectuate Congressional purpose); *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974) (commencement of class action tolls statute of limitations for class members who timely move to intervene after denial of class certification because purpose of statute of limitations served); *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983) (90-day statutory period for filing claims under Title VII suit was tolled during pendency of class action because purpose of statute of limitations served).

The reasoning used in *Zipes* and its progeny should also be used here. An interpretation that the notice requirement is subject to waiver, estoppel, and equitable modification or cure serves the particular purpose of the notice requirement as well as the general purpose of RCRA. Under the facts presented here, the requirement was either waived or subject to equitable modification or cure.

As noted above, the EPA and DEQ did not file an enforcement action in court against Tillamook County, and neither voiced any objection to not having received formal notice of the violation before the citizen suit was filed.

Although Tillamook County did not waive notice to the EPA and DEQ, it is doubtful that Congress intended it to have any standing to do so. Furthermore, Tillamook County has never demonstrated how it could have been prejudiced by the Hallstroms' failure to give notice to the government, and there is no indication how Tillamook County's conduct would have been any different.

Furthermore, this case presents circumstances justifying equitable modification of the notice requirement. The purpose of the notice was served by notice given after filing of the lawsuit. Trial began more than two years after formal notice was given to the government, and Tillamook County was not ordered to comply with RCRA until after trial. Furthermore, the Hallstroms justifiably relied on the district court's decision not to require dismissal and refiling. When the district court made its decision, *Garcia* and *Walls* had not yet been decided. Although the Seventh Circuit had decided *City of Highland Park v. Train*, 519 F.2d 681 (7th Cir. 1975), *cert. denied*, 424 U.S. 927 (1976), that case was filed against the EPA before notice to the EPA had been given. In the case now before the Court, of course, neither the EPA nor DEQ are parties. Indeed, neither has sought to intervene.

6. The Failure To Give Notice To The Government Was Cured.

Finally, the Hallstroms' failure to give notice before the suit was filed was cured because formal notice was given to the government more than 60 days before trial.

This Court has long permitted parties to cure alleged jurisdictional defects. For example, when diversity jurisdiction was challenged because of a lack of complete diversity, it was held that this defect could be cured by plaintiffs' voluntary dismissal of the nonessential nondiverse parties. *Horn v. Lockhart*, 84 U.S. (17 Wall.) 570, 579 (1873); *Conolly v. Taylor*, 27 U.S. (2 Pet.) 556, 565 (1829) (Marshall, C.J.). In a similar context of Title VII cases, the circuit courts, with one arguable exception, have all held that the requirement of a right-to-sue letter before an action can be commenced can be cured as long as the right-to-sue letter is received before trial. *E.g., Gooding v. Warner-Lambert Co.*, 744 F.2d 354, 358 n. 5 (3d Cir. 1984); *Hendersen v. Eastern Freight Ways, Inc.*, 460 F.2d 258, 260 (4th Cir. 1972), *cert. denied*, 410 U.S. 912 (1973); *Clanton v. Orleans Parish School Board*, 649 F.2d 1084, 1095 n. 13 (5th Cir. 1981); *Gutierrez v. Municipal Court of the Southeast Judicial District*, 838 F.2d 1031, 1053-54 (9th Cir. 1988); *but see Gibson v. Croger Co.*, 506 F.2d 647 (7th Cir. 1974), *cert. denied*, 421 U.S. 914 (1975) (defect could be cured by amending complaint after receiving right-to-sue letter, or by refiling). This ability to cure is found even in those pre-*Zipes* opinions that appear to characterize the requirement of a right-to-sue letter as jurisdictional. *E.g., Berg v. Richmond Unified School District*, 528 F.2d 1208, 1212 (9th Cir. 1975).

In *Berg*, the court held that the "later issuance of the 'right to sue' letter coupled with a filing of the supplemental complaint operated to cure any initial jurisdictional defect." 528 F.2d at 1212. The court recognized that some courts consider the requirement to be jurisdictional, but that it was more of a "procedural nicety." The court said:

> True, such letters have often been characterized as a "jurisdictional prerequisite" to a lawsuit under Title VII. [Citation omitted.] However, we read the statutory requirement in the light of the well-established principle that procedural niceties should not be employed to impede a Title VII claimant from obtaining a judicial hearing on the merits.

528 F.2d at 1212.

Here, the failure to give notice was cured. Had the EPA or DEQ filed an enforcement action within 60 days of receiving formal notice, then the Hallstroms' citizen suit could have been dismissed, stayed, or consolidated. The EPA and DEQ, however, chose to do nothing and were content to allow the citizen suit to proceed. It would be an extreme elevation of form over substance and an "unreasonable result plainly at variance with the policy of [RCRA] as a whole" to require this successful citizen suit to be dismissed and then refiled.

CONCLUSION

The Hallstroms respectfully request this Court to reverse the decision of the Ninth Circuit and remand the

case to the circuit court for consideration of the other issues raised on appeal.

Respectfully submitted,

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